

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

NATIONAL LABOR RELATIONS BOARD,	§	
	§	
Applicant,	§	
	§	
	§	1:15 – MC—00233
v.	§	
	§	
NEW YORK PARTY SHUTTLE, LLC,	§	
	§	
Respondent.	§	

NEW YORK PARTY SHUTTLE, LLC’S RESPONSE TO ORDER TO SHOW CAUSE

Respondent, New York Party Shuttle, LLC (“NYPS”) by and through its undersigned counsel, and in response to the Court’s Order to Show Cause dated July 30, 2015, respectfully files this Response and as grounds therefor, states:

Introduction

1. This case involves an abuse of authority by the National Labor Relations Board, in an attempt to harass and impose undue burdens on New York Party Shuttle, LLC. Although a Board Order has been entered finding that Mr. Pflantzer, the Real Party In Interest, was terminated improperly, there has never been a hearing or finding as to any back pay or front pay to which Mr. Pflantzer is entitled. That is the only remaining issue in the matter. The NLRB has never requested a finding of any damages. Now, they assert that they are concerned Respondent will not be able to pay damages, without even knowing the amount of damages, if any, to which Mr. Pflantzer is entitled. This proceeding, and the subpoena at issue, is premature and inappropriate at this time. The Court will see from the papers filed by NLRB that they have no evidence or support for their claim that they need documents or information related to companies that are not party to the

underlying proceeding and never employed Mr. Pflantzer. There is no evidentiary support for their assertion that Respondent cannot pay a damages award in this case. There is no indication of the amount of damages. At this point, we do not know whether the damages are \$1 or \$100,000. As a result, post-judgment discovery in the nature of seeking relief from third-party companies is premature.

Good Cause Exists for Excusing NYPS from Complying with Subpoena Duces Tecum

2. As the first basis for excusing NYPS from Compliance with the Subpoena Duces Tecum demanding production of the information reflected on the Subpoena, the Board Order pursuant to which the subpoena is issued is invalid and unenforceable. Two of the three members of the National Labor Relations Board who decided the underlying case and issued the Board Order were not validly appointed under the Constitution of the United States. “Because the Board must have a quorum in order to lawfully take action, the order under review is void *ab initio*. *Noel Canning v. N.L.R.B.*, 705 F.3d 490, 493 (D.C. Cir.) *cert. granted sub nom. N.L.R.B. v. Canning*, 133 S. Ct. 2861, 186 L. Ed. 2d 908 (2013); *aff’d but criticized*, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014); *See also New Process Steel, L.P. v. NLRB*, — U.S. —, 130 S.Ct. 2635, 177 L.Ed.2d 162 (2010). The NLRB argues that because the Fifth Circuit dismissed an appeal of the Board Order, it became an Order of the Fifth Circuit. While this argument might be accurate if the underlying Order had been evaluated and passed on by the Fifth Circuit, it does not apply where, as here, the merits of the underlying Board Order were never passed on by the Fifth Circuit. Further, the fact that two of the Members of the NLRB who decided the matter did not have legal authority to do so, renders the entire proceeding suspect, and amounts to a lack of subject matter jurisdiction that cannot be waived or ratified.

Subpoena Definitions

3. NYPS should not be required to comply with the Board Order requiring the production of information and documents because the NLRB's Definitions and Instructions in its Subpoena Duces Tecum are overreaching and amount to an inappropriate fishing expedition, as those definitions and instructions include other entities such as OnBoard Tours, Party Shuttle Tours, LLC, Washington DC Party Shuttle, and OnBoard Las Vegas Tours, LLC, without establishing any connection between these entities and NYPS, which is the only Respondent in the underlying proceeding and is the entity subject to the Court's July 30, 2015 Order.

4. There is no showing by NLRB that they have jurisdiction over those entities and no showing as to why documents and information possessed by those entities is in any way relevant to the underlying proceeding between the NLRB and NYPS. Respondent should not be required to comply with the subpoena requiring the production of information and documents that are over broad and/or outside the scope of the issues before this Court.

Documents Requested

Request No. 1.: Copy of Fred Pflantzer's personnel file, as well as copies of any documents, including, but not limited to, non-compete agreements, that OnBoard Tours had Pflantzer sign.

5. Response to Request No. 1: NYPS has produced Mr. Pflantzer's personnel file to the NLRB. It has also made clear on multiple instances that there is no written non-compete agreement between Mr. Pflantzer and NYPS. As such, there is nothing for the Court to compel here.

6. This Request, however, seeks documents "that OnBoard Tours had Pflantzer sign." There is no entity called "OnBoard Tours," and therefore that portion of the request is unrelated to this proceeding, and does not call for any documents that could exist.

Request No. 2.: Copies of documents, including but not limited to, manuals, handbooks, internal memoranda, and contracts showing any and all work rules,

policies, and procedures applicable to any persons who provided driver services and tour guide services for OnBoard Tours in New York City, Las Vegas, and Washington, D.C., during the periods from October 1, 2011 through August 31, 2012, and from January 1, 2014 to the present.

7. Response to Request No. 2: First, Respondent has provided all such documents, to the extent they exist, that related to Mr. Pflantzer's work for NYPS. Second, again the request relates to "OnBoard Tours," which is not an entity, so no such documents technically exist. Third, NYPS does not have any operations or business in Las Vegas or Washington DC, and therefore no such documents exist. Fourth, to the extent that the NLRB seeks employee manuals and related documents for Washington DC Party Shuttle, LLC, OnBoard Las Vegas Tours, LLC, or Party Shuttle Tours, LLC, none of those entities have anything to do with this proceeding or Mr. Pflantzer. They are in no way relevant to the only remaining issue in the case: how much, if any, back pay and front pay is Mr. Pflantzer entitled to? The Subpoena should be quashed for that reason.

8. NYPS should not be required to comply with the Board Order requiring the production of information and documents because the information is not relevant to the charge under investigation and the only reason the NLRB wants this information is to conduct a broader investigation of NYPS's corporate structure and financial condition. NLRB has offered no explanation of how the requested information might shed light on the charge under investigation. The only information offered by NLRB was that sometime in December 2014 it "received information about certain cash flow problems relating to the operation of NYPS's New York City location." This so-called information was not identified or described in any manner by the NLRB, but the NLRB is now seeking to broaden its investigation into matters that are not relevant unless a judgment is entered against NYPS and remains unpaid. These are not matters for pre-trial discovery and certainly are not matters relevant to the charge under investigation.

9. Finally, even if the requests were proper, they request information from other companies, with different management and different ownership, over which Respondent has no control. As a result, NYPS could not produce the requested information if it wanted to do so.

Interrogatories

Interrogatory 1: Provide the names and addresses of all financial institutions, including banks, where any accounts have been maintained by, or on behalf of, OnBoard Tours, Party Shuttle Tours, LLC, New York Party Shuttle, LLCX, Washington DC Party Shuttle, LLC, and OnBoard Las Vegas Tourism, LLC, during the periods from October 1, 2011 to August 31, 2012, and from January 1, 2014 to the present.

Interrogatory 2: For each financial institution provided in response to Interrogatory No. 1, provide the type of accounts at those financial institutions (e.g., business checking or business savings) and their account numbers.

10. Answers to Interrogatory 1 and 2: NYPS should not be required to comply with the Board Order requiring the production of information and documents because the information requested is not relevant to the charge under investigation and the only reason the NLRB wants this information is to harass NYPS. There is no legitimate need for this information. NLRB has offered no explanation of how the requested information might shed light on the charge under investigation. The only information offered by NLRB was that sometime in December 2014 it “received information about certain cash flow problems relating to the operation of NYPS’s New York City location.” This so-called information was not identified or described in any manner by the NLRB, but the NLRB is now seeking to broaden its investigation into matters that are not relevant unless a judgment is entered against NYPS and remains unpaid. These are matters for post-trial discovery and certainly are not matters relevant to the charge under investigation. Furthermore, this Interrogatory seeks to violate the privacy rights of various entities that have no relationship to Fred Pflantzer and have never had a relationship with Fred Pflantzer.

11. The time period requested is overbroad. None of the company’s records in the year

2010 are relevant because Pflantzer did not work at the company until 2011. Likewise, none of the company's records after February 2014 are in any way relevant, because Pflantzer was offered reinstatement at that point, so any back pay calculation ends at that point. The decision to the contrary by the Board is "obviously wrong."

12. The investigation is not being conducted pursuant to a legitimate purpose. In Paragraph 23 of its Application for an Order Requiring Obedience to Administrative Subpoena and Supporting Memorandum of Law, the NLRB asserts that NYPS has been obstinate and noncompliant with a prior Board subpoena and that NYPS has failed to turn over the most basic of information necessary to calculate back pay and determine derivative liability. This couldn't be further from the truth. In its first subpoena, the NLRB sought to obtain information to determine the amount of back pay, if any, to which Mr. Pflantzer is entitled. NYPS provided NLRB with all payroll records and the employment file of Mr. Pflantzer. From those records, NLRB has been able to determine the amount of pay Mr. Pflantzer would have obtained had he continued his employment with the company. In fact, in prior settlement negotiations, after the documents and information provided to NLRB by NYPS, counsel for NLRB prepared a spreadsheet that purported to calculate what Mr. Pflantzer was owed in back pay as of that date.

Timeliness of Petition to Revoke

13. The NLRB asserts that Respondent's Petition to Revoke the Subpoena was untimely. The Board rejected the Petition to Revoke in part on the basis that the Petition was untimely. Respondent disagrees.

14. A Petition to Revoke is due to be served within five business days of service of the underlying subpoena. Here, the NLRB alleges that they sent the subpoena in issue to the undersigned by "overnight mail" on March 26, 2015. Respondent cannot confirm nor deny

whether that occurred. However, the subpoena was not received in the office of Respondent's counsel until Monday, March 30, 2015. Respondent served its Petition to Revoke on April 6, 2015, five business days later, as required. *See* Exhibit A, Email transmitting Petition to Revoke.

Argument

15. This Court has the power and duty to protect litigants from the improper and unnecessary discovery sought by the NLRB through the subpoena. Specifically, Rule 45 of the Federal Rules of Civil Procedure provides that the issuing Court must quash or modify a subpoena that “requires disclosure of privileged or other protected matter” or that “subjects a person to undue burden.” F.R.C.P. 45(3)(A)(iii)-(iv). A subpoena should not be enforced if the reasons for resisting discovery outweigh the need for the discovery. *See e.g. Heidelberg Americas, Inc. v. Tokyo Kikai Seisakusho, Ltd.*, 333 F.ed 38, 40 (1st Cir. 2003) (quashing subpoena where purported relevance of documents was marginal and speculative); *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 713 (1st Cir. 1998); *Whittingham v. Amherst College*, 164 F.R.D. 124, 127-28 (D. Mass. 1995) (denying motion to compel where the purported need for the information, even if marginally relevant, was outweighed by privacy interests).

16. A District Court should enforce an administrative subpoena if the following elements are met: (1) if it is for a legitimate and proper purpose; (2) if the inquiry is reasonably relevant to the purpose; and (3) if the demand is not too indefinite, too broad, or unreasonable. *See UPMC*, 2013 NLRB LEXIS 268 (April 19, 2013); *NLRB v. Am. Med. Response, Inc.*, 438 F.3d 188, 192 (2d Cir. 2006) (emphasis in original, citations omitted). *United States v. Powell*, 379 U.S. 48, 57-58 (1964). *United States v. Morton Salt Co.*, 338 U.S.632 652 (1964); *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943); *NLRB v. Frazier*, 966 F.2d 812, 815 (3d Cir. 1992) (citing *United States v. Powell*, 379 U.S. 48, 57-58, 85 S.Ct. 248, 254-255, 13 L.Ed. 2d 112

(1964).

17. As set forth by the United States Court of Appeals for the Third Circuit, “Courts must insist that the agency ‘not act arbitrarily or in excess of [its] statutory authority . . .’” *NLRB v. Interstate Dress Carriers*, 610 F.2d 99, 111 (3d Cir. 1979) quoting *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 216, 66 S.Ct. 494, 509, 90 L.Ed. 614 (1946)), and in order to be valid, the subpoena must seek information relevant to the charge under investigation and/or arise out of the investigation.

18. Therefore, in order to enforce this Administrative Subpoena, the NLRB must demonstrate that: (1) its investigation has a legitimate purpose; (2) the inquiry is relevant to that purpose; (3) the agency does not already possess the information requested; (4) the agency has complied with relevant administrative requirements; and (5) the demand is not “unreasonably broad or burdensome.” *E.E.O.C. v. Kronos Inc.* 620 F.2d 287 (3d Cir. 2010) (citing *Univ. of Med. & Dentistry of N. J. v. Corrigan*, 347 F.3d 57, 64 (3d Cir. 2003) (quoting *FDIC v. Wentz*, 55 F.3d 905, 908 (3d Cir. 1995)). This, the NLRB has utterly failed to do. As demonstrated above, the discovery sought is not for a legitimate purpose, is not relevant to the issues before this Court. The information that is for a legitimate purpose and is relevant has been produced, and the NLRB’s demand for information in this Subpoena Duces Tecum is over broad and burdensome.

Conclusion

19. There is a minimal or no relationship between the NLRB Subpoena and the Board Order of May 2, 2013, finding that Fred Pflantzer was unlawfully terminated. Compliance with the subpoena would be an extensive, expensive, time-consuming, and potentially disruptive of the daily business activities of the Respondent, as well as requiring the disclosure of highly confidential and proprietary information. NYPS requests that the Court find that NYPS has shown

good cause exists to overturn or invalidate the Board's Order of May 2, 2013 and quash the NLRB's Subpoena Duces Tecum as to all defined entities.

Alternative Request for a Protective Order

20. In the event the Court orders NYPS to comply with the Subpoena Duces Tecum, then because of the confidential, proprietary, and private nature of the information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation may be warranted, Respondent petitions the Court to enter a protective order extending protection from disclosure to the real party in interest (Fred Pflantzer) as well as from public disclosure of the information or items that are entitled to confidential treatment under the applicable legal principles.

Prayer

WHEREFORE, Respondent New York Party Shuttle, LLC respectfully prays that this Court deny the NLRB's Application to Enforce its Subpoena *Duces Tecum*.

August 20, 2015

Respectfully submitted,

KILHENNY & FELIX

By: /s/ James M. Felix, Esq.
James M. Felix, Esq.
Attorneys for Defendant
New York Party Shuttle LLC
350 West 31 Street, Suite 401
New York, NY 10001
(212) 419-1492

Of Counsel:
James M. Felix, Esq.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served on the National Labor Relations Board on the 20th day of August, 2015 in the manner indicated below.

Rachel Feinberg
National Labor Relations Board, Region 2
26 Federal Plaza, Suite 3614
New York, NY 10278

Electronically

Barbara A. O'Neill
National Labor Relations Board
1099 14th Street, N.W., Suite 10700
Washington, DC 20005

Electronically

____/s/ James M. Felix, Esq. _____
James M. Felix